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## The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy

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The article connects two strands of the recent sociolegal debate: (1) the empirical discovery of new forms of spontaneous law in the course of globalization, and (2) the emergence of deconstructive theories of law that undermine the law's hierarchy. The article puts forward the thesis that law's hierarchy has successfully resisted all old and new attempts at its deconstruction; it breaks, however, under the pressures of globalization that produced a global law without the state, as self-created law of global society that has no institutionalized support whatsoever in international politics and public international law. Consequently, the article criticizes deconstructive theories for their lack of autological analysis. These theories do not take into account the historical conditions of deconstruction. Accordingly, deconstructive analysis of law would have to look for new legal distinctions that are plausible under the new conditions of a doubly fragmented global society. The article sketches the contours of an emerging polycontextural law.

### I. Deconstructing Systems

**A**fter deconstruction, what is left of law as a hierarchy of rules, founded on a political constitution, endowed with an institutional identity, based on the distinction between legislation and adjudication and legitimated through democratic representation and constitutional rights? Derrida (1990) uses the conceptual tools of deconstruction to dismantle the political architecture of the legal system:

Deconstruction is generally practiced in two ways or two styles, although it most often grafts one to the other. One takes the demonstrative and apparently ahistorical allure of logico-formal paradoxes. The other, more historical or more anamnestic, seems to proceed through readings of texts, meticulous interpretations and genealogies. (Derrida 1990:957, 959)

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Deconstruction reveals the foundation of law, the origin of its authority, to be a grandiose logico-formal paradox. Law is grounded only on itself, based on an arbitrary violence without ground, "la fondation mystique de l'autorité." Nor does the genealogy of legal decisions reveal law's stable identity as a system of valid rules, but only exposes law's recurrent aporias, situations of undecidability with ever shifting unstable differences in changing historical contexts. Law becomes a deconstructed disunity of discursive fragments which at the same time is haunted by the never satisfiable specter of justice.<sup>1</sup>

At first sight, systems theory stands in stark contrast to the intentionally obscure language of deconstructivism, which is not willing to reveal its theoretical presuppositions. The contrast holds true for style as well as for substance. While deconstructivism refuses to define a specific method or determine a guiding theoretical intention (Derrida 1988:82), systemism stylizes itself as an orderly theory cultivating conceptual precision and elaborating systematic theory constructs.<sup>2</sup> In substance, the theory of law as an autopoietic system stresses law's autonomy, its normative closure, structural determination, dynamic stability, emerging eigenvalues in binary codes and normative programs, and its reflexive identity.<sup>3</sup> How does this theory respond to the challenge of deconstruction? Is the radical constructivism of autopoietic law the very counter-program to anti-metaphysical deconstructivism?

"Second-order observation," systems theory's first answer to deconstruction, may come as an surprise.<sup>4</sup> Instead of reaffirming law as a system of rules, it observes law as a chain of operations that observes other operations under a certain scheme. Thus, it does away with any stable identity of law. "Observing systems" in its double meaning dissolves the stable order of legal structures into a fluid sequence of differences that acts simultaneously as the subject and the object of legal distinctions and indications. In second-order observation, law loses any fixed identity, any well-defined ontological status (Luhmann 1989). Rather, law is observed as an endless play of differences, as an ever changing transformation of distinctions, as an iteration of recursive events that are transformed through their resonance with changing

<sup>1</sup> For a reformulation of justice as deconstruction of law, see Derrida 1990:959ff.; 1994:90 n. 8, 102ff.; cf. also Kramer 1991; 1988:422ff.; Cornell 1990, 1992a, 1992b; Schlag 1990, 1991; Douzinas & Warrington 1994.

<sup>2</sup> For a systematic presentation of the theory of social systems which gives a concise definition of its main concepts and theorems, see Luhmann 1995b.

<sup>3</sup> A useful introduction into basic concepts of legal autopoiesis can be found in King & Schütz 1994. For a recent comprehensive analysis of law in systems terms, see Luhmann 1993c; for English language accounts, see Luhmann 1985, 1988, 1989, 1992a, 1992b; Teubner 1993, 1997a.

<sup>4</sup> For a definition of this concept see Foerster 1981; for its relation to deconstruction, see Luhmann 1993a; for its use in legal sociology see Luhmann 1993c:ch. 1.

contexts (Teubner 1997a). Diverse contexts construct multiple fictions of law, whether they fictionalize law as an effective instrument of political change, or as a subtle disciplinary weapon in capillary micropolitical power relations, as a structural basis of institutionalized power politics, as a stable normative framework for economic action, as an efficiency-enhancing tool, as a principled moral enterprise, a system of admonitions, or as a rule system that claims formal validity. Law's constructed identities change chameleon-like with the change of observation posts, each of which has an equally valid claim to truth. There is no stable predefined identity to the legal system but rather a multiplicity of conflicting identities that are constructed in different contexts of observation. Law is the same and it is not the same. So what's the difference between constructing and deconstructing legal systems?

"Paradoxification" is the second answer to deconstruction (Luhmann 1995a). The prominent place given to unsettling paradoxes by systems theory may again come as a surprise, given the value that theory places on concepts, forms, and systems.<sup>5</sup> Indeed, systems theory does not accept at face value the self-stylization of contemporary law as a hierarchy of rules where the lower normative acts are legitimated by different levels of higher rules that finally end in the constitutional legitimation of political sovereignty. Nor does systems theory accept the sovereignty claims of law's empire to legal integrity according to which the interpretive interplay of principles and rules allows for the one right solution (Dworkin 1986). Rather, it reveals that law's hierarchy is in reality a self-referential circularity where validity becomes a circular relation between rule making and rule application (Luhmann 1987). The hierarchy of law appears both entangled and reversed, much like Dumont's affirmative treatment and Derrida's deconstructive treatment of hierarchies (Dupuy 1990). Moreover, the self-referential character of legal operations, the recursive self-application of legal acts to the results of legal acts, lead directly into perplexing paradoxes of self-reference. The binary code of law, the distinction between legal and illegal if applied to itself, results in a paradoxical oscillation that paralyzes the observer (Teubner 1993:ch. 1). Systems theory sees the whole impressive apparatus of the legal order with its institutionalized code and programs as founded on a paradox, on the violence of an arbitrary distinction.

Combining both aspects, systems theory reveals the impressive architecture of layers of rule-making authority as the hard-core reality of a *trompe d'oeil*. The King's Two Bodies—the grandiose christological fiction of the immortal Sovereign

<sup>5</sup> For an analysis of the central role of paradoxes in the history of law, see Luhmann 1988.

"above" the mortal human being as the supreme source of law (Kantorowicz 1957)—have protected the law against the deconstruction of its foundation and its identity. The contradictory multiplicity of law's identities and the founding paradox of law are both to be found hidden behind the façade of law's hierarchy at the top of which the King's Two Bodies are governing law's empire. The constitutional law construction of the political democratic sovereign as the top layer of law's hierarchy has allowed the law to externalize its threatening paradox and to hand it over to politics where it is "resolved" by democracy. This externalizing maneuver by constitutional lawyers is equivalent to Hans Kelsen's (1971) attempt to externalize the founding paradox of law into the transcendentalism of the *Grundnorm* and to H. L. A. Hart's (1961) attempt to conceal it in the social acceptance of the ultimate rule of recognition. Similarly, the multiple identities of law, the uses different social contexts make of it, are no longer a matter for the responsibility of law but for democratic politics.

Again, what is the difference between constructivism and deconstructivism? Contrary to the superficial view that is content to contrast the antirational gesture of deconstructivism with the superrationalism of systems theory, a closer look reveals how strikingly similar they are in their theory design. Both are theories which, while rejecting unity, identity, and synthesis, begin with difference and end with difference. Both theories share a postmetaphysical, postdialectical, and poststructuralist character. "Systems theory and deconstruction have equally abandoned . . . transcendental philosophy, ontology, hermeneutics, centering the subject, binary logics (included the prohibition of circularity in argumentation)" (Hahn 1996:284, author's translation).

Most of the oscillating concepts of deconstructivism find their stable counterpart in the theory of auto-poiesis: *Différance* and the difference-creating cascades of distinctions in various contexts; *itération* and the recursive self-application of distinctions that are simultaneously the same and not the same; *présence/absence* and the inclusion/exclusion of systems of distinctions; *supplément* and the blind spot of distinctions, the invisible parasite, *violence de la fondation* and the arbitrary beginning of auto-poiesis.<sup>6</sup> It is as if simultaneous in(ter)dependent inventions have been made in Paris and Bielefeld.

Deconstructing systems—the oxymoron unites both theories. But here is also the point where the bifurcation begins. It is the second meaning of "deconstructing systems" that separates them and puts them on very different tracks. Systems theory places special emphasis on the second meaning. Not only are systems "passive" objects of deconstruction, systems are themselves "active"

<sup>6</sup> On differences and commonalities of the two theories, see Cornell 1992a, 1992b; Fuchs 1995:33ff.; Berg & Prangel 1995; Somek 1995:204; Ladeur 1995; Hahn 1996; Stäheli 1996.

subjects of deconstruction and, most important, of self-deconstruction. I would even go further; I would submit that the deconstruction of systems could not work without their self-deconstruction.

Systems theory does not accept the usual critique that deconstructivism is too destructive, nihilistic, critical, radical. Quite the contrary. Deconstructivism is not sufficiently critical, not radical enough! In several respects, deconstructivism does not go far enough in ruthlessly pursuing its own enterprise. It stops short of drawing consequences from its dissolution of stable systems into paradoxes and multiple identities. It remains in the suggestive and seductive ambiguities and ambivalences of the paradox exposing itself to the infinite demands of a transcendence (alterity, justice, generosity, friendship, democracy, . . .) which remain, however, forever indecipherable. From a systems perspective, deconstruction looks a bit like modernity's carnival, a funny, exciting, and at the same time sad and desperate reversal of its tangled hierarchies, but basically an entertaining enterprise without consequences, in its negative mirror image of entangled and reversed hierarchies ultimately affirming the order of modernity.

In what ways does deconstruction of law not go far enough? I see three roads that have not been sufficiently explored by a deconstructive analysis of law:

1. Lack of autologics which results in concealing that a deconstruction of law is possible only as law's self-deconstruction.
2. A performative contradiction in the deconstructive gesture, a fascination with the paradox that inhibits the deconstruction of the paradox itself, making deconstruction reluctant to take the risk of deconstructible unfoldments of paradoxes.
3. Elective affinities between legal semantics and social structures that make it possible to go beyond purely semantic deconstruction and to produce some knowledge about the post-deconstructive reality of law.

## II. No Consequences

Deconstructivism is perhaps the most perplexing but not at all the first intellectual movement to challenge law's hierarchy. The classics of legal sociology, Karl Marx, Max Weber, Eugen Ehrlich, as well as today's theories—of legal pluralism, legal institutionalism, critical legal theory, economic analysis of law, theories of private government, theories of legal self-reference—have all attacked law's hierarchy with the King's Two Bodies reigning in its upper chambers. All this to no avail, the King's Two Bodies carrying on regardless. All attacks on them turned out to be ut-

terly unsuccessful in the institutionalized practices of law (Wiethölter 1986:53; Heller 1985:185). Whatever the nagging doubts within legal theory, legal practice is still reproducing its operations, interweaving them into an ordered hierarchy of rules that draws its legitimacy from a political (written or unwritten) constitution. Despite all contextual relativization, legal practice continues to ascribe to itself an autonomous identity, to use the institutionalized distinction between legislation and adjudication, and to legitimate itself by the appeal to democratic representation and constitutional rights. It seems that the relentless deconstruction of law has no consequences (Fish 1989). The remarkable thing is that law's hierarchy has survived and probably will survive all subversive discoveries of its tangled, circular character, all undermining revelations of its paradoxical foundations, all threatening contradictions of multiple identities—if these discoveries are not accompanied by the self-deconstruction of legal practices themselves.

Let me illustrate this with an example, the law of "private governments." What happened here to the attempts of deconstructing law's hierarchy and the unity of state and law? Classical doctrine of legal sources, not in its sense as a jurisprudential construct but as the "working theory of practice," as a set of distinctions inscribed in the everyday work of legal institutions and effectively used in the ongoing practice of legal reasoning, ignored the phenomenon. According to the traditional doctrine of legal sources, normative phenomena outside the legitimating hierarchy, so-called private regimes of normative regulation, are nonlegal—Savigny said so (Savigny 1840:12). They may be anything—professional norms, social rules, customs, usages, contractual obligations, intra-organizational or inter-organizational agreements, or arbitration awards—but never law. The distinction law/nonlaw is based on law's hierarchy of rules where the higher rules legitimate the lower ones. Normative phenomena outside of this hierarchy are not law, just facts. After the decline of natural law, the highest rule in our times is the constitution of the nation-state—whether written or unwritten—which in its turn refers to democratic political legislation as the ultimate legitimation of legal validity. In spite of recurrent doubts voiced by various movements in legal theory, judicial adjudication is still seen as subordinated to legislation. And in spite of even stronger recurrent doubts, contractual rule making as well as intra-organizational rule production is still seen either as nonlaw or as delegated lawmaking that must be recognized by the official legal order. Rule making by "private governments" is thus subjugated under the hierarchical frame of the national constitution that represents the historical unity of law and state.

And it is not the recurrent theoretical critique of law's hierarchy but historical developments in the practice of law that are

now breaking this frame. The name of the great paradoxifier is neither "Jacques Derrida" nor "Niklas Luhmann." Its name is "globalization."<sup>7</sup> The recurrent doubts about law's hierarchy so easily silenced in the nation-states' past can be silenced no more. They explode in the face of the "statelessness" of *lex mercatoria* and other practices that produce global laws without the state (Teubner 1997b). It is globalization of law that is killing the sovereign-father and making the legal paradox visible.<sup>8</sup>

The most successful case of law without a state has been *lex mercatoria*, a transnational legal order of global markets that has developed outside national and international law.<sup>9</sup> Multinational enterprises now arrive at contracts which they submit neither to national jurisdiction nor to national substantive law. They agree on international arbitration and on the application of a transnational commercial law that is independent of any national law. Among legal practitioners this has created great confusion. Sober lawyers become very emotional when they have to judge the monstrosities of an "anational" legal order:

It is difficult to imagine a more dangerous, more undesirable and more ill-founded view which denies any measure of predictability and certainty and confers upon the parties to an international commercial contract or their arbitrators powers that no system of law permits and no court could exercise. (Mann 1984:197)

Practitioners of international commercial law are involved in a battle about fundamental questions: Should national courts recognize *lex mercatoria's* "private justice" as a new positive law with transnational validity? Could such an ambiguous normative phenomenon which is "between and beyond" the laws of the nation-states and at the same time "between and beyond" law and society be applied by arbitration bodies according to the rules of the law of conflicts? Does it contain distinct rules and principles of its own?<sup>10</sup> Obviously, a new legal practice has been established with its own substantive law and its own judge-made law that cannot be integrated in the traditional hierarchies of national and

<sup>7</sup> The "globalization" of law concept is somewhat misleading. It seems to suggest that a multiplicity of legal orders is moving toward a unified global legal system. It is more appropriate to speak of a worldwide legal system from the moment when legal communication takes place on a global scale. National legal orders in their turn are not autonomous legal systems; rather, they are forms of territorial differentiation of worldwide legal communication (see Luhmann 1982; 1993c:571ff.; Schütz 1997). For analyses of the mutual impact of globalization and law, see Dezalay 1990; Shapiro 1993; Trubek 1993; Friedman 1996; Twining 1996.

<sup>8</sup> I should hasten to add that globalization is not the only paradoxifier of law's hierarchy. Here I use it as a paradigmatic case for an external irritation that triggers law's self-deconstruction. For other historical occasions which made law's paradox visible, see Luhmann 1988.

<sup>9</sup> For a recent account, see Cooter 1994; Stein 1995; Dezalay & Garth 1995.

<sup>10</sup> Cf., for example, Cour d'Appel de Paris 1.9.1988, Nr. 5953, *Revue de l'arbitrage* 1990, 701-712; 13.7. 1989, *Revue de l'arbitrage* 1990, 663-674 (Lagarde); Cour de Cassation de Paris 22.10. 1991, *Revue de l'arbitrage* 1992, 457-461 (Lagarde).

international law. Compared with contracting practices within national law, what is new is not that private governments produce their own laws. Rather it is that they evade the regulatory claims of national and international law and practice a legal sovereignty of their own. This is the decisive difference between *lex mercatoria* and other contractual forms which forces legal practice either to loosen the connection of its operations to the legal hierarchy or to declare the whole phenomenon as nonexistent.

However, *lex mercatoria*, the transnational law of economic transactions, is only one of the numerous cases of a global law where the Political Sovereign has lost his power.<sup>11</sup> It is not only the economy but also various sectors of world society that are developing a global law of their own.<sup>12</sup> And they do so—as Giddens (1990:70) has put it—in “relative insulation” from the state, from official international politics and public international law. Internal legal regimes of multinational enterprises have developed an impressive body of global law without a state (see Robé 1997; Muchlinski 1997). A similar combination of globalization and statelessness can be found in labor law; in the *lex laboris internationalis*, enterprises and labor unions as private actors are the dominant lawmakers (see Bercusson 1997). Technical standardization and professional self-regulation have developed similar tendencies toward worldwide coordination with minimal intervention of official international politics. Human rights discourse has become globalized and is pressing for its own law, not only from a source other than the states but against the states themselves (Bianchi 1997). Especially in the case of human rights it would be “unbearable if the law were left to the arbitrariness of regional politics” (Luhmann 1993c:574ff., author’s translation). In the world of telecommunication, we experience the Internet struggling for its own global legal regime. Similarly, in the field of ecology, there are tendencies toward legal globalization in relative insulation from state institutions. Even in the world of sport, people are discussing the emergence of a *lex sportiva internationalis* (Simon 1990; Nafziger 1996).

While postmodern legal theorists claim to have revealed the paradoxical foundations of law (Kerchove & Ost 1992), they would do better to make the “material basis” responsible for the revelation and not the “superstructure.” Their blind spot is a conspicuous lack of autologics that makes them fail to analyze the historical conditions of their own critique.<sup>13</sup> Deconstruction is a universal method which means that virtually any identity, any sys-

<sup>11</sup> For the effects of economic globalization on the development of policy networks that are no longer legally accountable to nation-states, see McGrew & Lewis 1992.

<sup>12</sup> For some aspects of global law without the state, see the collection edited by Teubner 1997c.

<sup>13</sup> A statement is autological if it refers to itself (“This sentence has . . . letters”). A rule is autological if it regulates its own application (e.g., a constitution regulating its own transformation). A theory is autological if it explains its own incidence (e.g., systems the-

tem, any distinction can be deconstructed. This raises then the question under what historical conditions deconstruction actually has social effects in its dissolution of identities and its revelation of paradoxes and under what conditions it does not. It seems that deconstruction needs to historicize itself and ask why it has emerged as a successful intellectual strategy which resonates in society at the end of the 20th century (Luhmann 1993b:490).

Having undertaken such an autological analysis, deconstructivism would have to admit that it is a consequence of crucial historical developments in society and culture making such perplexing and paralyzing paradoxes visible. These developments create the structural conditions so that at a certain historical moment, law's foundations are suddenly seen as paradoxical, among others but by no means exclusively by deconstructivists. The paradoxes of law could have been revealed at any time in legal history—and actually they have been; however, they had been well concealed in socially accepted hierarchical relations. They come to the fore only under certain historical configurations when the ways of concealing them lose their plausibility in the web of other distinctions, when this web is being torn apart, making the founding paradox reappear.

In our case of lawmaking without the Sovereign, for centuries the strange paradox of self-validation of contract and organization has remained in a strange twilight. Such phenomena were known jurisprudential conundra, but they remained latent. To be sure, noncontractual foundations of contract and nonorganizational foundations of organization have been politicized by Hobbes, historicized by Savigny, and socialized by Durkheim. But these problems have not been really resolved, rather they have been suspended and maintained in their latency. The reasons for this latency are historical. The nation-state, its constitution, and its law have provided for the safe distinction between legislation and adjudication that was apparently able to absorb all forms of "private lawmaking." They replaced contractual and organizational autovalidation by their heterovalidation. The King's Two Bodies were suitably nourished to conceal behind them the two great paradoxes: the paradox of the nonofficial law's self-validation; and the foundational paradox of the official law itself. Thus, the emergence of law's paradoxes was not the ingenious discovery of postmodern jurisprudence whose deconstructive techniques reveal law's aporias, antinomies, and paradoxes. Rather, hard-core social reality made law's paradoxes visible—in this case: fragmented globalization. It is the difference between a highly globalized economy and a weakly globalized politics that

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ory explaining itself as a product of functional differentiation). For autologies in the law, see Luhmann 1993c:316-17, 498-99.

presses for the emergence of a global law that has no legislation, no political constitution, no politically ordered hierarchy of norms which could keep the contractual paradox latent (for more details, see Teubner 1997b). The hierarchy of norms did not break under the attack of legal theory, but it does break effectively when it is deconstructed by legal practices themselves.

Perhaps this is one of the greatest difficulties one has to face if one tries to transfer the deconstructive enterprise from literary criticism and philosophy to institutionalized social practices like law, politics, and the economy. Derrida Himself speaks of "hasty transpositions" and "confused homogenizations" (Derrida 1990: 933). Pierre Schlag tends to think into this direction when he stresses the crucial importance of "L.A. Law" against "Law's Empire," the relevance of institutionalized bureaucratic practices as against conceptual legal doctrines (Schlag 1991:890ff.). I see this as an important step in overcoming the sociological "thinness" of deconstructivism. There is a sociological supplement which threatens philosophical deconstructivism. In systemic terms, the supplement would be the distinction between "observation" and "operation." The object of traditional deconstruction is "Law's Empire": self-observations of the legal system, "pure" social abstractions of law, legal theories and doctrines, normative arguments and interpretations. The dangerous supplement would be "L.A. Law": elementary operations of law, law's "dirty" social practices, the elementary dispositions that effectively change legal structures. And the decisive thing is that those elementary operations are not blind power acts but themselves make use of distinctions. They observe, distinguish, and indicate; they construct worlds of meaning—and deconstruct them. The play of differences takes place not only in the argumentative practices of legal self-observations but also in the hard-core operations of legal self-reproduction. And if deconstruction and self-deconstruction are to occur, they need not only to reach the legal interpretation of texts but also to connect up with those institutionalized hard-core operations of the law itself. Look at our example of rule hierarchy again: While legal theory has limited its deconstructive efforts to concepts of legal hierarchy developed by legal theory and doctrine, today's globalization of law is deconstructing the operative hierarchy itself. The self-reproduction of law's hierarchy, questioned for decades by legal critique, effectively breaks down under the pressures of globalization.

However, the questions for deconstructivism as a quasi-transcendental theory are: How much does it cherish its own blind spot? Is it bound to refuse an autological optics which would allow it to see its own historicization? Is this theory imprisoned by its self-limitation to texts and intertextuality? Indeed, Drucilla Cornell's distinction between systems theory and deconstruction tends to dismiss a sociological (self-)illumination of deconstructi-

vism: "In terms of the relationship between sociology and a quasi-transcendental analysis such as Derrida's philosophy of the limit, this understanding of deconstruction has led to the inescapable conclusion that sociology, even its most sophisticated forms, such as Luhmann's systems theory is misguided" (Cornell 1992b: 1599).

And Cornell herself makes a rather limited use of sociological theory to reveal the perseverance of violence in "social reality" instead of exploring its liberating autological potential.

### III. After Deconstruction?

If I try to understand with empathy the "ambience" of legal deconstructivism, I cannot help but sense a strange feeling of suspense, deferral, hesitation, even a kind of paralysis, in all the frantic moves and countermoves on justice as the possibility of deconstruction of law and vice versa. Deconstruction

changes places and dances together with other unstable indicators such as *différance*, *trace*, *écriture*, *supplément*, *blanc*, and *marge* around a center which can no longer be characterized as either present or absent. It is like dancing around the golden calf while knowing that an unqualifiable god has already been invented. Or, in system terms, is deconstruction the self-organization of this dance, complaining about a lost tradition and becoming, by this very complaint, dependent upon this tradition, so it cannot decide and need not decide whether such a center is or is not present? (Luhmann 1993a:766)

"Law and the postmodern mind" seems to be caught in a performative contradiction. While relentlessly deconstructing, it is falling in love with its object of deconstruction. Is the postmodern mind trapped in a fetishist relation to the deconstructed "thing" which makes it impossible for it to suffer the loss of this thing and stops it from getting rid of this beloved object to make the liberating move beyond?

In recent postmodernist legal writing—especially that of Drucilla Cornell, Jack Balkin, Costas Douzinas and Ronnie Warrington—you can sense a suffering from this self-inflicted paralysis and at the same time a strong desire to make the liberating post-deconstructive move. The question is only: In what direction? With growing unease they experience the open epistemological situation in which meaning worlds and knowledge systems are arbitrarily invented, varied, collapsing, reinvented, varied, collapsing . . . . "If you experience that such an infinity is a dead end then you search for indicators for steps beyond this diffuseness which should not be a regressus in the space of the meaningful world of hermeneutics" (Gumbrecht 1991:845; author's translation).

Jack Balkin's "transcendental deconstruction" is one attempt to overcome the shortcomings of deconstruction. Ultimately, he "relies on the existence of human values that transcend any given culture" (Balkin 1994:1138; 1993:124-27; 1987:763). Deconstruction becomes for him nothing but a "rhetorical practice that can be used for many purposes depending on the political choices of the "deconstructor," among them the choice for those values. It thematizes the "normative chasm between inchoate human values and their cultural articulations" (1994:1177; emphasis omitted). Thus, justice can never be "fully" achieved; however, as he insists against Derrida, this is not "infinite" but only "indefinite."

Jack Balkin, at least, has the courage to face the question, After deconstruction? And he insists on this even if Pierre Schlag (1991:890, 930; 1990:1635) tells him again and again that he is asking the wrong question. But then he falls back upon pre-deconstructive positions when he relies on quasi-natural law and transcendental existence of values that are only imperfectly articulated. Deconstruction affects everything, not just the politically incorrect distinctions. It is not a technique that annihilates only my adversary's arguments and leaves room for my choices. Derrida has often distanced himself from an instrumental-political use of deconstruction, particularly in his critique of Critical Legal Studies U.S.-American style (Derrida 1990:933). Deconstruction digs deeper and reveals the aporias, antinomies, paradoxes that make even more urgent the demands of justice. In Derrida's words, these would be the infinite demands of the uniqueness of the Other (not only understanding him, or having empathy with him, or speaking his language, as Balkin has it). Thus, justice is impossible but at the same time cannot be disconnected from law. It is "haunting" the law, and the result is not approximation—but provocation!

Expose the law to Alterity! This is the route into the aporias of deconstruction that other postmodern writers take, following Lévinas's and Derrida's instructions. It is the direct experience of the demands of the Other, as a nonlinguistic, noncommunicative, nonmediated perception, the experience of the nonbridgeable alterity, the infinite uniqueness of the Other which throws the objective and general order of law into chaos but at the same time remains there as the continuing call for justice (Lévinas 1979; Derrida 1990:959ff.; 1994:90 n.8, 102ff.). While Derrida, of course, is rather elusive about where this road leads to, Cornell, Douzinas and Warrington courageously explore this road (Cornell 1992a; 1990:1051ff.; Douzinas & Warrington 1994:ch. 4, 6). Where do they arrive at? At the recommendation that judges take the legitimate concerns of suppressed minorities into account. Laudable as this is as an ethical imperative, as a result of their ambitious theorizing it is somewhat disappointing. Does an ap-

peal for human rights become more convincing after the detour via deconstruction?

There are more fundamental doubts about the combination of deconstruction and alterity to which I can only allude here. Is the uniqueness of the Other indeed the ultimate experience that remains after deconstruction? Systems theory would argue that it is rather the experience of the "blind spot" of any distinction that makes the quest for its immanent "adequacy" and its transcendent "justice" even more urgent. By no means would systems theory dismiss as irrelevant the question for law's transcendence that is at the core of Alterity. However, this question would be raised not only in relation to human beings in their unique singularity. The fundamental inadequacy of communicative practices not only to the other but to the world is an experience that accompanies it from the beginning. Attention is then drawn to the "injustices" that social discourses, among them law, create for the consciousness and the bodies of people, for the balance of the ecology, and, last but not least, for other communicative practices themselves.

To be sure, it is an important move of deconstructive justice to reintroduce boldly the dimension of the sacred into the law. Deconstructive justice cannot be equated with any standard internal to the law; at the same time it is not an extralegal political or moral standard. Deconstructive justice does not represent any immanent principle of society. It addresses directly the transcendence of law. By stressing the unbridgeable divide between law and justice and its simultaneous nonseparable intertwinement, it reformulates a relation of law to the sacred that has been lost with secularization.<sup>14</sup> And it is remarkably different from the usual bridging of law and religion, of legal doctrine and theology. Rather, deconstructive justice opens the experience of an areligious, an atheological transcendence that makes a political-legal reflection of the transcendent dimension possible, even under the contemporary condition that "God is dead." This is a bold and powerful thought and introduces into legal thought a difference that makes a difference.

However, I do not share the juridical Derridites' optimism that such an experience of law's transcendence would inspire or even guide political and legal activism. I do not deny that it makes an important difference in the practice of politics and law—extreme demands of a justice that can never be realized, the almost unbearable experience of an infinite responsibility, a sense of fundamental failure of law, even a tragic experience that whatever you decide in law will end in injustice and guilt. But how should this experience ever guide political legal action in

<sup>14</sup> "The law is transcendent and theological, and so always to come, always promised, because it is immanent, finite and so already past" (Derrida 1990:993).

the sense of designing legal rules of minority protection, immigrants' and women's rights?

Drucilla Cornell sometimes relies on the dimension of time (Cornell 1990:1062). Justice does not reveal itself before the fact. But does she do so post hoc? Is there any judge for the infinite responsibility within a reasonable amount of time? Are not the demands of justice forever indecipherable? Is not the justice *à-venir*, which means forever *a-venir* and never present or past? The instrumentalization of deconstructive justice for political and doctrinal purposes means to desacralize it, to level the deep divide between legal-political immanence and transcendence.

Does Derrida's own deconstruction of Lévinas help (Derrida 1978)? He argues against Lévinas that ethical asymmetry is in danger of being reduced to an excuse for domination and violence if it is not supplemented by phenomenological symmetry. The Other needs to be recognized phenomenologically as alter ego. But what else than a vague humanitarian impulse can one expect for law from phenomenological symmetry as deconstruction of the philosophy of alterity? I cannot see how such a "deconstructivism with a human face" will give any meaningful orientation in the face of the urgent question how law copes with the demands of justice in today's supercomplex society. It is not by chance that the legal and political applications of deconstruction restrain themselves wisely to the relatively simple conflict between minorities and the state where it is relatively easy to be partisan (Cornell 1992a; 1990:1051ff.; Douzinas & Warrington 1994:chs. 4, 6). But they remain silent when it comes to conflicts between human rights, not to speak of collisions between incompatible worlds of meaning. And even if we insist on the fundamental divide between law and justice that denies that justice can be translated into law, do we not need to search for an adequate conceptualization of the human condition at the end of the 20th century that tells us more about our society than a mere mystical appeal to alterity? It seems that even the most "ethical" interpretation of "affirmative" deconstruction remains caught in the paradoxical relation between an immanent law and transcendent justice (cf. the critique by Vismann 1992:261).

What is needed is a self-transcendence of deconstruction itself. It is interesting to note how deconstructivism explicitly avoids self-application. It refuses to apply its operations to its own core distinctions. It grants itself a strange self-exemption that is the very cause of its paralysis: "Justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists" (Derrida 1990:945).

The deconstructive dance, if such a thing exists, may overcome its paralysis once it acknowledges that deconstruction itself can be deconstructed. Paradoxification itself is a paradoxical op-

eration. In its oscillations it has two sides. On its "logical" side, it oscillates between the positive/negative value of the distinction and paralyzes the observer. On its "rhetorical" side, it oscillates between paradoxification and deparadoxification. And it is time, the temporalization of the paradox, that leads out of permanent oscillation. It shows what the game of deconstruction is about: an almost rhythmically pulsating movement from hiding the paradox, to revealing it, to hiding it again. . . . Thus, deconstruction need not remain the dance of paralysis, rather it may turn out to be the very provocation for inventing new distinctions! Deconstructible distinctions, of course! Distinctions that for the time being hide the paradox anew and await its future revelation.

Returning to our example, the law of private governments in the global society, where is the new hiding place for the founding paradox of law to be found once the protective rule hierarchy has been deconstructed? If we take the risk of inventing deconstructible unfoldments of the paradox of law, should we search for it in the direction of a "polycontextural" law that would not be hierarchical, but heterarchical, a law with multiple sources, a law without a unifying perspective, a law that is produced by different mutually exclusive discourses in society (Günther 1976b)? Law remains the same but appears as different depending upon the diverse social discourses that "produce" it. The same is different. The traditional hierarchical differentiation of law into legislation and adjudication would be replaced by a heterarchical multitude of legal orders structurally linked to other discourses. Those links would a circular self-referential way be connected to each other. Political legislation loses its privileged place and becomes just one peripheral mode of lawmaking among other forms of plural law production. The patchwork of ethnic and religious minority laws, rules of standardization, professional discipline, contracting, intra- and interorganizational rule making—all the different modes of Michel Foucault's (in)famous "normalisation" (Foucault 1979:ch. 3, 2)—would be equally valid forms of law production. Thus, the founding paradox of law hitherto hidden in the one great fiction of the Political Sovereign would now be dissolved into a multiplicity of paradoxes of self-validation. The One King has Two, Three, Four, . . . , Many Bodies!

The multiple laws of polycontexturality hide their paradoxical self-validation in an "as if." Each of them has its own fictitious founding myth. None of them has a clear-cut historical beginning. Rather, the beginning is in the middle! It is like in the famous "Glas" by Jacques Derrida (1974) where the text has no beginning but begins in the middle of a story that had already started. The recursive operations of each of these polycontextural laws cannot begin *ex nihilo*; they can only refer to something that already exists. But due to their very recursivity they cannot

refer to something outside of their chain of recursions; it must be something within this chain to which they refer. And if this "something" does not exist, they have to invent it! These laws as systems of recursive legal operations can only refer to past legal operations. The solution again is an "as if," but not the fiction of a founding myth as a self-observation, rather as the fiction of past legal decisions as bases for recursive operations.

#### **IV. Elective Affinities: Legal Semantics and Social Structure**

What gives us the certainty that such a concept of "polycontextural law" is not in its turn susceptible to philosophical deconstruction? Or, worse, that it will not be the victim of its own self-deconstruction? Nothing, of course. And one thing is certain—that it can be deconstructed. Post-deconstructive distinctions are not immune against their deconstruction, they are themselves deconstructible. But the crucial question is: What are the conditions for their temporal stability? This is the point where second-order observation goes beyond deconstruction insofar as it observes how the risk of an deconstructible unfolding of the paradox is taken. Who is the observer who takes this risk? When? Under what social structural conditions?

Here, sociology of law comes in a second time. Now, it is no longer the question of what are the historical conditions for law's self-deconstruction, in other words, the question, When do law's operations clash with its observations so as to make the paradox visible? Rather, a sociological analysis would introduce here the elective affinity between legal semantics and broader social structures in order to explain if and why the "unfolding" of the paradox has a certain social plausibility. Indeed, it is the specter of Marx that is haunting us here, with its triad of modes of production, class structure, and law as one among several ideologies. The new triad—differentiation, social structure, and legal semantics—makes it clear that contemporary society is the result of a structural and semantical catastrophe. The catastrophe happened in modernity, and postmodernity's fate is to become painfully aware of its negative consequences.

If this is so, the deconstruction of our metaphysical tradition is something we can do now. But if so, it would be worthwhile to choose the instruments of deconstruction with sufficient care so that by using them we could gain some information about our postmetaphysical, postontological, postconventional, postmodern—that is postcatastrophical condition. (Luhmann 1993a:777; emphasis omitted)

This would be the step beyond Derrida's recommendation of "walking through the desert," the "necessarily indeterminate abstract, desert-like experience that is confided exposed, given up

to its waiting for the other and for the event" (Derrida 1994:90). He maintains that in spite of the unbridgeable gap between doing justice to the uniqueness of the Other and the calculations of law that deconstruction reveals, one nevertheless should continue the search for justice and "negotiate" the uniqueness with the generality, objectivity, calculability of law. But here is the source for the paralysis: Deconstruction itself cannot furnish criteria (Vismann 1992:264). This leads to the unmediated confrontation of a deconstructed law with the infinite demands of Justice. Law in ruins is haunted by the specter of Justice. In such a situation what can one expect from "negotiation"?

Derrida criticizes Benjamin's appraisal of divine violence which human beings cannot distinguish from mythic violence (Derrida 1990:1033ff.). *Tu quoque, Iacobus!* He exposes himself to a similar critique. In spite of all recurrent appeals to negotiation, deconstruction leaves us in a situation of an unbearable responsibility. "Before the law" of deconstructivism, we live under the infinitely heavy demands of an inaccessible authority the commands of which we cannot decipher. Derrida puts himself under the obligation of a promise: "And a promise must promise to be kept, that is, not to remain 'spiritual' or 'abstract', but to produce events, new effective forms of action, practice, organization, and so forth" (Derrida 1994:89).<sup>15</sup>

But it is not very convincing to appeal—as Derrida does—to second-best solutions if he cannot say anything about the direction into which one should move "negotiations" and "compromises." Are such empty criteria of second best all that's left after deconstruction?

Against this, the instruments of deconstruction would need to be directed not only at revealing the multitude of meaning and the underlying paradox and to confront this with the haunting demands of an ever distant justice, but also at finding out something about the situation after the catastrophe, in the Master's voice, and at formulating what the intended "maximum intensification of a transformation in progress" could virtually mean in an "industrial and hypertechnologized society" (Derrida 1990:933). And for this purpose it is important to see that after deconstruction, not only is one exposed to the unbridgeable gap between a deconstructed law and a transcendent justice that allows only bad compromises and negotiations but also to the possibilities of new distinctions creating worlds of meaning that would mediate between deconstructed law and deconstructing justice. What would a possible new correlation between social structures and legal semantics look like that allows at least for a transitory deparadoxification? What are the forms of social differ-

<sup>15</sup> Derrida often expresses strong self-obligations for political action as a consequence of deconstructive activities, e.g., Derrida 1990:930–31.

entiation that give a temporary plausibility and social acceptability for new legal distinctions?

Again, law's globalization seems today to be the key to understanding the differentiation of a social structure that tolerates a different legal semantics which would sufficiently displace and conceal law's paradox, at least for the time being. Globalization breaks the link connecting law to the democratically constituted political discourse. It exposes law directly and without the mediation of democratic politics to the fundamental social condition of today's world society: to its "double fragmentation"—cultural polycentrism and functional differentiation (Sinha 1995; Luhmann 1995a). This may give a sociological direction to the search for post-deconstructive distinctions. One would look for legal semantics that reflect and endure this double fragmentation. The search is for legal distinctions that will not be undermined by polycentricity but will rather take it for granted and build on it. "Ubi societas ibi ius" (Grotius). What does law look like in a doubly fragmented world society?

Let us have a closer look at our King's Many Bodies. Could it be that the post-deconstructive concept of polycontextural law, the laws of the many discursive sovereigns, has an elective affinity to this double fragmentation of world society? Does a polycontextural law meet the conditions of historical plausibility and social acceptability in times of globalization? How can one be sure whether polycontextural law is not in itself a regression to pre-deconstructive concepts? I have only preliminary answers: One is "transjunctural operations," another is multiple externalization of the paradox.

A first tentative answer might be found in the "transjunctural operations" that constitute different forms of law where there is no political sovereign. The structural reason for such apolitical law production is "that on the global level there is no correspondence for the structural coupling of politics and law via a constitution" (Luhmann 1993c:582). Thus a different logic of norm production and of legal argumentation is required: "A legal theory in line with the times ought to reorient itself and its concepts to a heterarchically relational logic of linkage, if it is to find the functional equivalent to the stable relations between subject and general reason, between individual case and norm" (Ladeur 1995).

Under conditions of the nation-state, standard setting, professional self-regulation, and intra-organizational legal regimes are strongly politically mediated when they are to be transformed into valid legal rules. Under conditions of globalization, however, private governance regimes lose this organizational and legitimating mediation and can be institutionalized only as forms of a close contact between operationally closed systems, without mediation by institutionalized politics. These are institutions—I call

them “linkage institutions”—that create new law directly by trans-junctional operations without being translated into political issues. In their ongoing procedures they operate in terms of more than one binary code which they treat with conjunctive and disjunctive operations. They operate—within one institution but over the boundaries of two or more operationally closed social systems—with several binary codes and connect them through transjunctive operations (Günther 1976a). They create a rejection value that negates the binary codes as such. They contain “a deeper two-valuedness that encroaches on the classical opposition of positivity and negation and contains it as a special case. This further transclassical two-valuedness is the alternative between acceptance and rejection value” (Günther 1976a:28). For example, one might look at technical standardization, where such standards are elaborated in the frame of the true/false distinction of science. Then the rejection value is introduced against the acceptance value of the scientific binary code. This opens the road to a multiplicity of other codes. The standard is “translated” into the economic, political, ecological, or legal discourse. It is recontextualized in the languages of those discourses and takes on different meanings (antonym substitution; Holmes 1987:25ff.). Thus, linking institutions have the capacity to take into account the multivalued character of a fragmented society. However, with the interplay of binary codes on one level and acceptance and rejection value on another level, the linking institutions still work with manageable binary distinctions since they create multiple different layers of a two-valuedness. Thus, we have in the case of linkage institutions a semantics of law that seems to be calibrated directly to the double fragmentation of world society.

Another answer might be found in the multiple externalization of paradoxes. The paradoxes of self-validation would not vanish but would be concealed by being externalized to the social practices with which they have close contact. Polycontextual laws externalize their paradox by creating their own myths of origin. These are fictions of their foundation which are based, nevertheless, on ongoing outside processes.

It is the fragmented order of diverse discourses outside of the law where we find the external on which the fictions of polycontextual laws depend. It is not only a psychoanalytical experience where the client, to escape the circularity of self-reference, invents a fictitious hetero-reference in the person of the therapist to whom the full knowledge of the symptom is attributed. Žižek’s analysis applies similarly to the emergence of polycontextual law:

it is only the illusion of a prior knowledge that in the end produces actual knowledge. Here lies the fundamental paradox of the signifying process. The only possibility of creating new

meaning is to go through the illusory premise that this knowledge already exists. (Zizek 1992:IV.2.5)

There must be enough nonlegal meaning material that law can misunderstand as legal precedent. There must be a historical "situation in which it is sufficiently plausible to assume that also in former times legal rules have been applied" (Luhmann 1993c: 57). An example would be an international transaction that has taken place outside the frame of any national contract law. The strange fiction is that its expectations are law which needs to be judged according to an existing legal order. *Lex mercatoria* refers either to a rich fund of commercial practices, which has evolved under the chaotic conditions of the global market or, should one say, to the practices that have been imposed by the stronger economic interests. At present, in an arbitration context, lawyers pretend that these merely social expectations are the law to which legal decisionmaking can refer as precedents. Arbitrators in commercial disputes pretend that old arbitration cases decided according to equity are precedents for them and begin to distinguish and to overrule. The paradox of contractual self-validation can now be hidden in the infinite history of age-old commercial usages.

In a similar vein, organizational patterns and routines have evolved within a multinational organization. The fiction is created that these rules are labor law. The paradox of its self-validation will be concealed in the routines of an organizational hierarchy. Equally, an enterprising inhabitant of cyberspace delineates a limited chunk, demands money for access, and pretends to have created legal property. Such are historical situations in which polycontextural law creates its recursivity based on fictitious precedents and conceals its paradox in nonlegal discourses.

## V. The King's Many Bodies Are Invisible

How would this image of a continual paradoxification and deparadoxification of law change the perception of basic institutions of law? Can we develop normative perspectives of those institutions' transformation in a post-deconstructive spirit?

It would be tempting to declare law's major task as Making the King's Many Bodies visible. Haunting the new lawlords: naming, blaming, claiming—the attribution of lawmaking creates a new visibility. There are tendencies in legal pluralism that indeed point in this direction.<sup>16</sup> "Private governments" have deficiencies in their public character, but they can be made accountable. "Quasi-political regimes" are dictatorial, but they could be made

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<sup>16</sup> For recent analyses of legal pluralism and its normative implications, see Petersen & Zahle 1995; Gerstenberg 1997.

more democratic. "Nongovernmental actors" behave irresponsibly, but they could be made responsible for their actions.

However, here the otherwise fruitful metaphor of the King's Many Bodies seems to become misleading. It is fruitful insofar as it reveals the multiplicity of fictions that have replaced the one great fiction of the law-producing Sovereign. But it becomes misleading if it makes us think that double fragmentation of the world society means that political power on the global level is nothing but decentralized, that legislative sovereignty is only dispersed in identifiable decisionmaking centers. This would be another regression to pre-deconstructive distinctions, this time not of a moral but of a political character. It would support the wrong analogy to political sovereignty: action, power, influence, manipulation, responsibility.

Like the self-deconstruction of law's hierarchy, we must face the self-deconstruction of political power, domination, and sovereignty in the world society. The autopoietic deconstruction makes us see world society as a society without hierarchy and without a sovereign. To be sure, world society is rife with violence and repression, but it is not a society steered by political domination. The result of globalization is not just a multiplication of sovereigns producing laws for their little domains. Rather, global law is dominated by its blind environments, by the systems of its inner societal environment. And the decisive thing is that this domination does not work in a politically attributable and accountable way, rather

its project is the replacement of hierarchy—and autarky—by heterarchy. This means that *arkhé* (mastery) is located neither at an uppermost level—it is not hierarchy, mastery by name and for the sake of the holy (an absolute and externally given quality)—, nor within the system itself—it is not autarky, self-mastery or self-sufficiency. *Arkhé* (mastery) is located outside and in front of the system, that is, just beyond the system's borders with its accompanying other or *heteros*. The role of the accompanying other, or partner or *heteros* of heterarchy, is performed not by the environment—which cannot perform any role—but by other systems present in the system's environment. Yet, even this relationship is structured by the distinction system/environment: If one dealt in systems only, heterarchy would be unthinkable. Heterarchy is, of course, a paradoxical mastery—a mastery without a master. (Schütz 1997:275)

If this is so, then a "constitution" for polycontextural law cannot simply extend the historical experiences of the political constitutions *per analogiam*. Curbing abuses of power: that great formula of the legal tradition will not help in "civilizing" the King's Many Bodies. We must face the impossibility of constitutionalizing legal multiplicity in the language of legal restraints on the arbitrariness of the sovereign.

The new reality, it is true, is lack of a *métra-récit*, lack of society's comprehensive political rationality. However, systems theory would urge us to realize that in spite of all deconstruction, social subsystems relentlessly stick to their institutionalized "iron laws" of superspecialized rationalities. They are highly rational in themselves, but with regard to the whole society they are blind, uncoordinated, selfish, chaotic, expansive, and imperialistic. In its double fragmentation, world society tends to develop self-destructive tendencies. Thus, a "constitution" for polycontextural law would need to redefine its focus: from the sovereignty of politics to the domination of the many environments and from the sovereign's abuse of power to self-destructive tendencies of colliding discourses.

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